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REPRESENTING MANAGEMENT EXCLUSIVELY IN LABOR,
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STAMFORD, CT

WASHINGTON, DC

WHITE PLAINS, NY

February 2, 2001

VIA FACSIMILIE (202-208-3013)

Thomas P. McCarthy, Esq.
Field Attorney
National Labor Relations Board
Region 5
103 South Bay Street - 8th Floor
Baltimore, Maryland 21202-4061

*Exempted
6-27-01*

Re: American Institute of Physics
Case No. 5-CA-29366

Dear Mr. McCarthy:

As I mentioned, the enclosed position statement was sent via Federal Express on January 29th. I understand you have not received it and are therefore sending you a second copy via facsimile.

Very truly yours,

JACKSON, LEWIS, SCHNITZLER & KRUPMAN

Mark L. Sussman
Mark L. Sussman

MLS/gm

cc: Alan C. Becker

[REDACTED] Correspondence\2-2-01 Ltr to McCarthy fax position statmt. wpd

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January 29, 2001

VIA FEDERAL EXPRESS

Thomas P. McCarthy, Esq.
Field Attorney
National Labor Relations Board
Region 5
103 South Bay Street - 8th Floor
Baltimore, Maryland 21202-4061

*Exempted
6-7 (c)*

Re: American Institute of Physics
Case No. 5-CA-29366

Dear Mr. McCarthy:

We represent American Institute of Physics ("AIP") in the above-referenced case. This letter, and the attached exhibits, respond to the charge and amended charge filed by AIP's [REDACTED] Jeff Schmidt ("Schmidt") and demonstrates that AIP [REDACTED] for legitimate, non-discriminatory reasons. [REDACTED] caused [REDACTED] by [REDACTED] admission that [REDACTED] "stole" time from AIP to write an almost 300 page book. In these circumstances, [REDACTED] charge should be dismissed in its entirety. No employee is entitled to use work time for [REDACTED] private pursuits, instead of doing the job [REDACTED] is being paid to do. [REDACTED] characterization of [REDACTED] actions as stealing is accurate. [REDACTED] stole work time and productivity from AIP.

I. MOST OF [REDACTED] ALLEGATIONS ARE BARRED BY THE SIX MONTH
STATUTE OF LIMITATIONS CONTAINED IN SECTION 10(b) OF THE ACT.

Section 10(b) of the Act states in pertinent part that:

*... no complaint shall issue based on any unfair
labor practice occurring more than six months prior
to the filing of the charge with the Board. ...*

In your January 17, 2001 letter to Mark Sussman, Esq., you set forth [REDACTED] allegations. Aside from [REDACTED] on May 31, 2000 and an alleged meeting regarding

performance reviews on August 29, 2000, all of [REDACTED] allegations occurred more than six months prior to November 28, 2000 -- the date [REDACTED] allegedly filed the unfair labor practice charge. In these circumstances, all of the allegations set forth from the fourth paragraph on the first page of your letter through the fifth paragraph on page 4 of your letter, are outside the six-month statute of limitations contained in Section 10(b). Therefore, no response to these time-barred allegations is necessary. 1/

II. AIP [REDACTED] BECAUSE [REDACTED] ADMITTEDLY "STOLE"
FROM [REDACTED] EMPLOYER.

A. [REDACTED] For Legitimate Non-Discriminatory Reasons.

The American Institute of Physics is a not-for profit membership corporation chartered in 1931 for the purpose of promoting the advancement of the knowledge of physics. Its members are comprised of leading societies in the fields of physics and related sciences. AIP publishes scientific journals, including the magazine *Physics Today*. *Physics Today* ("PT") is a scientific journal which solicits feature articles from experts in the field of physics. After an article is drafted, the draft is reviewed by PT's editorial staff. Thereafter, the article is sent to an outside expert for peer review. After peer review is completed, a PT staff editor develops a strategy for the author to make revisions. After the author revises the article, the article, which is now in its "ready to edit" stage, is returned to PT for editing by a staff editor.

[REDACTED] worked for PT as an [REDACTED] from 1981 to May 31, 2000. [REDACTED] was [REDACTED] direct supervisor from in or around September 1994, until the time of [REDACTED]. As an [REDACTED] [REDACTED] was responsible for editing a defined number of feature articles per year. [REDACTED] responsibilities included working on both "ready to edit" articles and those in the pre "ready to edit" stage.

In or around the latter part of May, 2000, AIP learned that [REDACTED] had written a book. [REDACTED] AIP's [REDACTED] read a review of [REDACTED] book, which contains [REDACTED] statement that [REDACTED] had written the book on "stolen" time. Since no one in management at AIP knew [REDACTED] was writing or had written a book, [REDACTED] obtained a copy of the book and read some of the book's INTRODUCTION to see if the review of the book accurately quoted [REDACTED]. Unfortunately it did. In the INTRODUCTION [REDACTED] announced unequivocally that:

*This book is stolen. Written in part on stolen time,
that is. I felt I had no choice but to do it that way.*

1/ By not responding to the time barred allegations, AIP does not concede that the allegations are true. These time-barred allegations are meritless and are completely irrelevant to the legitimate reasons for [REDACTED]

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Like millions of others who work for a living, I was giving most of my prime time to my employer. My job simply didn't leave me enough energy for a major project of my own, and no one was about to hire me to pursue my own vision. . .

* * *

So I began spending some office time on my own book. . .

Emphasis added (Exhibit 1).

[REDACTED] INTRODUCTION admits that [REDACTED] took AIP's money, used its facilities and its time to write a book. Prior to [REDACTED] disclosure, AIP had experienced an ongoing issue with the lack of production by [REDACTED]. Accordingly, when AIP learned, late in May 2000, that [REDACTED] admitted to using work time to write a non-work related book, rather than using AIP's time to achieve [REDACTED] productivity goals, [REDACTED] employment was [REDACTED]. In addition, [REDACTED] statement that [REDACTED] wrote [REDACTED] book on stolen Company time flew in the face of AIP's efforts to have employees meet productivity goals.

Clearly, AIP had a legitimate reason to [REDACTED]

B. Even if The Region Were To Consider [REDACTED] Time-Barred Allegations, [REDACTED] was Proper.

We assume that you included [REDACTED] time barred allegations in your January 17, 2000, letter to demonstrate that there are allegations that AIP had some animus toward [REDACTED] alleged concerted protected activities. As demonstrated below, [REDACTED] time barred allegations are irrelevant to [REDACTED]

In October 1998, [REDACTED] requested a six month sabbatical (Exhibit 2). AIP granted [REDACTED] request (Exhibit 3). [REDACTED] took [REDACTED] sabbatical from December 14, 1998 to May 11, 1999. On June 29, 1999, [REDACTED] requested that [REDACTED] be allowed to work part-time. Specifically, [REDACTED] proposed that [REDACTED] be allowed to work two-thirds time for two-thirds pay (Exhibit 4). AIP also granted this request. In these circumstances, there can be no inference of animus toward [REDACTED] regarding [REDACTED] allegations of earlier conduct by AIP.

Even if the Region considers [REDACTED] time barred allegations, in conjunction with the grounds for [REDACTED] charge should be dismissed. In Wright Line, 251 NLRB 1083

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(1980), the NLRB set forth the test to apply in a dual-motive case.^{2/} The Wright Line test requires that AIP show that it would have taken the same action in absence of [REDACTED] alleged protected concerted activity. 251 NLRB at 1089.

[REDACTED] statement in [REDACTED] book that [REDACTED] stole time from AIP and wrote [REDACTED] book on Company time, instead of doing [REDACTED] job, and meeting [REDACTED] productivity goals, as other employees were expected to do, is a legitimate reason for [REDACTED]. Under Wright Line, it is clear that AIP would have [REDACTED] even in the absence of any alleged protected concerted activity and the charge and the amended charge should be dismissed in its entirety.^{3/}

Given the time constraints that you have imposed and the fact that you have not responded to our January 18, 2001 letter, AIP reserves the right to amend this position statement and submit additional evidence if necessary.

For all the foregoing reasons, the charge and amended charge should be dismissed.

Very truly yours,

JACKSON, LEWIS, SCHNITZLER & KRUPMAN


Alan C. Becker

ACB:kf
Enc

cc: [REDACTED]

^{2/} We do not concede that this case is a "dual motive" case. However, even under the NLRB's Wright Line test, the complaint should be dismissed.

^{3/} The only other allegation that is not time-barred is [REDACTED] allegation that on August 29, 2000, AIP purportedly held a meeting to tell employees not to discuss their performance reviews. AIP unequivocally denies this allegation. Moreover, since August 29 is three months after [REDACTED] this allegation obviously could not be relevant to the reason for [REDACTED]

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EXHIBIT 1

INTRODUCTION

This book is stolen. Written in part on stolen time, that is. I felt I had no choice but to do it that way. Like millions of others who work for a living. I was giving most of my prime time to my employer. My job simply didn't leave me enough energy for a major project of my own, and no one was about to hire me to pursue my own vision, especially given my irreverent attitude toward employers. I was working in New York City as an editor at a glossy science magazine, but my job, like most professional jobs, was not intellectually challenging and allowed only the most constrained creativity. I knew that if I were not contending with real intellectual challenges and exercising real creativity—and if I were not doing anything to shape the world according to my own ideals—life would be unsatisfying, not to mention stressful and unexciting. The thought of just accepting my situation seemed insane. So I began spending some office time on my own work, dumped my TV to reappropriate some of my time at home, and wrote this book. Not coincidentally, it is about professionals, their role in society, and the hidden battle over personal identity that rages in professional education and employment.

The predicament I was in will sound painfully familiar to many professionals. Indeed, generally speaking, professionals today are not happy campers. After years of worshipping work, many seemingly successful professionals are disheartened and burned out, not because of their 70-hour workweeks, but because their salaries are all they have to show for their life-consuming efforts. They long for psychic rewards, but their employers' emphasis on control and the bottom line is giving them only increased workloads, closer scrutiny by management and unprecedented anxiety about job security. In this way the cold reality of employer priorities has led to personal crises for many of this country's 21 million professionals.

Burned-out professionals may not be immediately obvious to the casual observer, because typically they stay on the job and maintain their usual high level of output. But they feel like they are just going through the motions. They have less genuine curiosity about their work, feel less motivated to do it and get less

EXHIBIT 2

15 September 1998

To: [REDACTED]

From: [REDACTED]

[REDACTED] --

I would like to take a half-year unpaid sabbatical and then return to my job. The sabbatical would begin after I complete my work for the November 1998 issue, after I edit an article for an issue beyond November and once we have provided a means to cover my workload in my absence.

[REDACTED]

EXHIBIT 3

INTER-OFFICE MEMORANDUM

TO:

[REDACTED]

FROM:

EXTENSION: 3102

DATE:

20 November 1998

SUBJECT:

Leave for [REDACTED] [REDACTED]

After 17 years with AIP, [REDACTED] would like to take a six-month "sabbatical" leave. From 14-31 December 1998, [REDACTED] will be on vacation, and from 1 January to 11 May, [REDACTED] will be on leave without pay. Upon [REDACTED] return, [REDACTED] will assume [REDACTED] regular responsibilities with the magazine. During [REDACTED] absence, [REDACTED] editing duties will be covered by cottage employees and independent contractors.

[REDACTED]

EXHIBIT 4

29 June 1999

[REDACTED]

I would like to work on a part-time basis. I would do 2/3 of the work for 2/3 of the salary.

This would solve the workload issue that you have raised, both within the new framework that you have asserted and within my capabilities (after all these years, at my age, I am not prepared to take on additional work). I would be happy to discuss this with you when you return from the July 4 holiday; I'll ask [REDACTED] to let me know when you would like to meet.

[REDACTED]